

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DENNETH BASS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9-19) is not yet reported. The opinion of the district court (App. B, *infra*, pp. 21-27) is reported at 308 F. Supp. 1385.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 29) was entered on November 30, 1970. Mr. Justice Harlan extended the time for filing a petition

(1)

for a writ of certiorari to January 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether 18 U.S.C. App. (Supp. V) 1202(a) should be construed to prohibit any possession of a firearm by a felon, or only possession that is specifically "in commerce or affecting commerce."

STATUTES INVOLVED

18 U.S.C. App. (Supp. V) 1202(a) provides in pertinent part:

Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce * * * any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. (Supp. V) 1201 provides:

The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons [and others covered by § 1202 (a)] * * * constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce,

(2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, respondent was convicted on two counts which charged him, as a previously convicted felon, with possessing firearms in violation of 18 U.S.C. App. (Supp. V) 1202(a). He was sentenced to concurrent prison terms of fifteen months. Following his conviction, respondent timely moved for an order in arrest of judgment on the ground that the indictment did not allege and the prosecution failed to prove that his possession of the firearms was "in commerce or affecting commerce" within the meaning of Section 1202(a).¹ The district court denied the motion, holding that the statutory phrase "in commerce or affecting commerce" modifies only the term "transports" and not the terms "receives" and "possesses" (App. B, *infra*,

¹ Section 1202(c)(1) defines "commerce" to mean interstate commerce.

pp. 22-25). The court found this interpretation of the statute supported by its legislative history and the formal congressional findings expressed in Section 1201. Finally, the district court held that the statute as so construed was constitutional (App. B, *infra*, pp. 26-27).

On appeal, the court of appeals reversed (App. A, *infra*, pp. 9-19). The court found that, notwithstanding the grammatical context of the "commerce" phrase and the statute's legislative history, Section 1202(a) should be construed to require an allegation and proof of an effect on interstate commerce of the felon's possession (App. A, *infra*, pp. 12-15). The court reasoned that it would have been illogical for Congress to condition a transportation charge on the showing of a connection with commerce while exempting possession and receipt charges from the same showing—particularly since a transportation would necessarily involve a receipt or possession (App. A, *infra*, p. 13). The court was also of the view that substantial constitutional doubts about Congress' power to enact the statute would exist if the law were construed not to require a showing that a felon's possession was in interstate commerce (App. A, *infra*, pp. 15-19).

REASONS FOR GRANTING THE WRIT

In the relatively brief period since Section 1202(a) was enacted (June 19, 1968), approximately 150 prosecutions of the present type have been brought, of which a substantial number are pending. The courts of appeals and district courts have sharply divided on the issue whether the statute requires specific alle-

gation and proof that a felon's possession or receipt of a firearm had an interstate commerce connection. The decision below is directly contrary to the majority of decisions rendered, including specific holdings by the Fourth and Ninth Circuits. *United States v. Cabbler*, 429 F. 2d 577 (C.A. 4), certiorari denied, November 9, 1970 (No. 525 this Term); *United States v. Daniels*, 431 F. 2d 697 (C.A. 9). Compare *United States v. Wiley*, 309 F. Supp. 141 (D. Minn.) and *United States v. Davis*, 314 F. Supp. 1161, 1165-1167 (N.D. Miss.) (both upholding the government's construction of the statute) with *United States v. Harbin*, 313 F. Supp. 50 (N.D. Ind.).² It is apparent, therefore, that the proper construction of the statute is a question of importance warranting resolution by this Court.

While the statute is not a model of logic or clarity, we think that the conclusion below is not required by the statutory language and is inconsistent with the legislative history. As the opinions below point out, the statute was the result of an amendment on the floor of the Senate to the bill that became the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. It was passed with little discussion apart from an explanation of its provisions by its sponsor, Senator Long. 114 Cong. Rec. 13,867-13,869, 14,772-14,775 (90th Cong., 2d Sess.). That explanation, however, left no doubt that the intended effect of the amend-

² The question is pending before the Sixth, Eighth and Tenth Circuits in cases already briefed and argued.

ment was to make any possession of firearms by a felon a federal offense. Senator Long stated (114 Cong. Rec. 13,868):

I have prepared an amendment * * * simply setting forth the fact that anybody who has been convicted of a felony * * * is not permitted to possess a firearm * * *.

Earlier, at the time the amendment was adopted, he indicated that the amendment sought to "make it unlawful for a firearm * * * to be in possession of convicted felon." He answered in the negative a question from Senator McClellan as to whether a felon could possess a firearm in his own home (114 Cong. Rec. 14,773, 14,774).

While it is admittedly difficult to perceive any rationale for requiring a showing of an interstate commerce connection as to the crime of transporting a firearm by a felon without requiring a similar showing with respect to the possession and receipt prohibitions, we point out that the contrary construction does even greater violence to traditional tenets of statutory construction by attributing to Congress the intent to pass an almost wholly redundant statute. Since 1961, it has been a federal crime for any felon to "receive any firearm * * * which has been shipped or transported in interstate or foreign commerce" or to ship, transport or cause to be shipped or transported any such firearm.

15 U.S.C. 902(e), (f).³ These statutes were repealed and recodified in somewhat expanded form in title IV of the same 1968 Omnibus Crime bill of which the present Section (1202(a)) was a part, and are now found in 18 U.S.C. (Supp. V) 922(g), (h).

These recodified sections make it a crime for a felon "to ship or transport any firearm * * * in interstate or foreign commerce" or to receive any firearm which has been so shipped or transported. Since receipt (and hence possession) of a firearm "in interstate * * * commerce" has thus been a crime—punishable by imprisonment for up to five years (see former 15 U.S.C. 905; 18 U.S.C. (Supp. V) 924(a))—both prior to and after 1968, the construction of Section 1202(a) by the court below to cover the same ground relegates that statute in its entirety to virtual redundancy. Given the choice between making the entire amendment superfluous and leaving a possible question of consistency in only one clause of the amendment, we submit that the latter is more rational, since it gives effect to the clear intent of Congress.

The doubts of the court of appeals about the constitutionality of the statute as so construed are not warranted. Although no studies or extensive debate accompanied Section 1202(a), Congress had ample basis in recent official reports on crime for its conclu-

³ This statute was originally passed in 1938 limited to persons convicted of a crime of violence.

sion in Section 1201 that possession of firearms by felons constitutes a burden on interstate commerce, as well as a threat to the safety of the President and Vice President of the United States, and to the continued and effective operation of the governments of the United States and the various States. See, *e.g.*, Staff Report to the National Commission on the Causes and Prevention of Violence, *Firearms and Violence in American Life* (1969); S. Reps. Nos. 1097, 1501, 90th Cong., 2d Sess.; H. Rep. No. 1577, 90th Cong., 2d Sess.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

JANUARY 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 204—SEPTEMBER TERM, 1970

(ARGUED SEPTEMBER 30, 1970, DECIDED NOVEMBER 30,
1970.)

DOCKET No. 34640

UNITED STATES OF AMERICA, APPELLEE

v.

DENNETH BASS, DEFENDANT-APPELLANT

Before: DANAHER,* FRIENDLY AND HAYS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge*, convicting appellant, after a jury trial, of two counts of possession of firearms in violation of 18 U.S.C. (Appendix) § 1202(a)(1) (Supp. V. 1970).

Reversed.

GERALD A. FEFFER (Milton Adler, Legal Aid Society, New York, New York, on the brief), *for Appellant.*

*Senior Judge, Court of Appeals for the District of Columbia Circuit, sitting by designation.

BOBBY C. LAWYER, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Thomas J. Fitzpatrick, Assistant United States Attorney, on the brief), *for Appellee.*

HAYS, *Circuit Judge*: This is an appeal from a judgment entered in the United States District Court for the Southern District of New York convicting appellant of two counts of possessing firearms in violation of 18 U.S.C. (Appendix) § 1202(a)(1) (Supp. V. 1970). Appellant was sentenced to fifteen months imprisonment on each of the two counts, the terms to run concurrently.

The indictment in this case stems from an investigation by a United States treasury agent of suspected narcotics violations by appellant. Agent George Jordan, acting in an undercover capacity, met the appellant at his home in order to arrange a purchase of narcotics. Appellant directed Jordan to the basement where the purchase was made from an unknown person. The following day, the agent returned and purchased a quantity of narcotics directly from appellant. At this time, the agent observed that appellant was carrying a Baretta automatic pistol. Jordan obtained an arrest warrant for appellant and a search warrant for appellant's apartment. He then proceeded to the apartment and, after being admitted, observed a sawed-off shotgun on a night table. At this time, other agents knocked on the door and announced themselves; appellant fled and was apprehended at the rear door by a waiting agent. The subsequent search of the apartment produced the Baretta, which was under a bathtub.

The statute under which appellant was convicted provides:

"(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both."

18 U.S.C. (Appendix) § 1202(a) (Supp. V. 1970).

It was stipulated at trial that defendant had been previously convicted of the felony of attempted grand larceny in the second degree, so as to place him within the scope of the statute. At trial, appellant did not deny ownership of either the apartment or the weapons. His contention here is that as the government did not specifically allege and prove that the possession of the firearm was "in commerce or affecting commerce," the statutory requirements for conviction have not been fulfilled. Alternatively, defendant argues that should the statute be interpreted to allow conviction for possession of a firearm without proof of some connection with interstate commerce, it would

be unconstitutional. Since we agree with the first contention and also with the second to the extent of believing that the Government's construction would create serious constitutional doubts, we reverse appellant's conviction.

I

The controversy over the proper interpretation of the statute involves the question of whether the phrase "in commerce or affecting commerce" modifies "transports" alone or whether it also applies to receipt and possession. This question has plagued several district courts, with conflicting results.¹ In the only Court of Appeals decision interpreting the statute, *United States v. Daniels*, — F. 2d — (9th Cir. 1970), the Ninth Circuit affirmed the conviction, simply citing the opinion of the district court in the instant case, 308 F. Supp. 1385 (S.D.N.Y. 1970). At least part of the confusion can be attributed to a most unedifying and inadequate legislative history. Sections 1201 and 1202 of Title 18 U.S.C. (Appendix) were enacted as part of the Omnibus Crime Control and Safe Streets Act. After extended debate on numerous controversial issues, these two sections, known collectively as Title VII, were introduced on the floor by Senator Long. He twice set forth the purpose of the Amendment. 114 Cong. Rec. 13,867-69, 14,772-75, 90th Cong., 2d Sess. (1968). After his second speech, there was some brief debate; the few thoughts that were expressed seemed to favor the amendment in principle, but there

¹ *United States v. Harbin*, 313 F. Supp. 50 (N.D. Ind. 1970); *United States v. Francis*, Cr. No. 12,684 (E.D. Tenn., Dec. 12, 1969); *United States v. Phelps*, Cr. No. 14,465 (M.D. Tenn., Feb. 10, 1970); *United States v. Davis*, No. ORG 69126-K (N.D. Miss., July 2, 1970); *United States v. Vicary*, Cr. No. 44205 (E.D. Mich., June 29, 1970).

appeared to be a desire for further study. Unexpectedly, however, a vote was called for, and Title VII passed with no further discussion, and no amendment.

Absent meaningful legislative history as to whether proof of some connection with interstate commerce was intended to be a prerequisite for prosecution for receipt and possession as well as transportation, the government relies on "one of the simplest canons of statutory construction," *United States ex rel. Santarelli v. Hughes*, 116 F.2d 613, 616 (3rd Cir. 1940), that is, that a limiting clause is deemed to apply solely to its last antecedent unless the subject matter requires a different construction. See *FTC v. Mandel Brothers Inc.*, 359 U.S. 385, 389 (1959). The word "transports," the government argues, is the only word modified by the commerce requirement, a conclusion which the government further supports by citing the arrangement of the commas. The argument, though it may be technically precise, leads to an illogical conclusion. Interpreting the commerce requirement to modify only the "transports" clause means that, although intrastate receipt and possession are punishable under the statute, intrastate transportation is not. Moreover if both "receipt" and "possession" are punishable without regard to the interstate elements, the modifying clause is meaningless, since there can scarcely be "transportation," whether intrastate or interstate, without an accompanying receipt or possession. Thus, in order to argue that a commerce requirement is not imposed by the statute on "receipt" or "possession," the government is forced to take the position that the commerce requirement of the statute is either totally illogical or mere surplusage.

It is considerably more probable that the commerce language was inserted to avoid questions of the scope

of Congressional power and to mirror the approach to federal criminal jurisdiction reflected in many other federal statutes. See, e.g., 18 U.S.C. § 1951 (1964) (obstructing or affecting interstate commerce or movements of commodities in commerce by robbery or extortion); 18 U.S.C. § 875 (1964) (transmitting kidnapping or extortion threats by means of interstate commerce); 18 U.S.C. § 2421 (1964) (transporting women in interstate commerce for prostitution).

The government also attempts to support its reading of the statute by reference to Section 1201, which provides:

“The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce,

(2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.”

This provision was part of the original proposal offered by Senator Long on the floor of the Senate and accepted with no substantial discussion. 114 Cong. Rec. 13,867; 90th Cong., 2d Sess. (1968).

The section lists four separate threats posed by the receipt, possession or transportation of firearms, only

one of which deals with burdens on interstate commerce. From this the government reasons that there was no intent to impose a commerce requirement. Although these "findings" may be designed to provide additional constitutional bases for the legislation, a matter which we shall deal with shortly, the incorporation of the commerce language into both Sections 1201 and 1202 indicates the fallacy of the contention that as a matter of statutory interpretation the other "findings" can support a conviction without a proof of a commerce connection. Once again, the government is left with the position that the language employed in Section 1202 is mere surplusage, a contention that is as unsatisfactory here as it was in the context of the government's grammatical argument.

II

One further factor compels us to interpret the statute as requiring a showing that receipt or possession must be in or affecting interstate commerce. Although grammatical statutory maxims have proved inadequate in this case, there remains the cardinal principle of both statutory construction and constitutional law requiring the interpretation of statutes, if possible,² to avoid a reading which would create serious constitutional doubts. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Justice Brandeis concurring); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *Richmond Screw Anchor Co. v. United States*, 275

² Resort to this principle of statutory construction in this case does not lead to "distortions of statutes and manipulations of narrow constitutional doctrines." Gunther, *The Subtle Vices of the "Passive Virtues"*—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 21 (1964).

U.S. 331, 346 (1928); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). A situation in which, as here, an interpretation not entailing constitutional doubts can be reached independently, provides a particularly appropriate occasion for the application of the principle. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958).

There is serious doubt in the present case whether the statute, if given the interpretation for which the government contends, could withstand constitutional scrutiny. To establish constitutionality the government relies upon such cases as *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941). In each of these cases there is something more than the mere bald assertion that a particular activity is a burden on interstate commerce. For example, the statute involved in *Heart of Atlanta Motel v. United States*, *supra*, was carefully circumscribed to apply only to establishments providing lodging to transient guests, an activity which it was said, affects interstate commerce *per se*. In *Katzenbach v. McClung*, *supra*, only restaurants which served food, a substantial amount of which moved in commerce, or which served or offered to serve interstate travelers, were subject to the statute. In *Maryland v. Wirt*, *supra*, the only enterprises employees of which were covered by the statute were those which engaged in commerce or in production of goods for commerce.

White v. United States, 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928 (1968), relied on so heavily by the government, is factually distinct, even if we were inclined to accept its holding for purposes of deter-

mining this case. In the first place, Congress, in enacting the 1965 amendments to the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301-392 made findings based not on conjecture but on committee hearings. *White v. United States*, *supra* at 6. More importantly, the court itself recognized the distinct problems inherent in the field of drug regulation:

“Unlike many other objects of federal regulation, depressant and stimulant drugs are not an inert, passive substance, which, after use, pass into the realm of statistics of consumption. They exert an influence on the consumer, which may spell danger or disaster for people or property from or in other states. As for distribution Congress has acknowledged that attempts prior to 1965 to regulate proscribed interstate traffic have failed because of the impracticality and impossibility of determining source of origin identification.” 395 F.2d at 7.

Even in *United States v. Perez*, 426 F.2d 1073 (2d Cir. 1970), there was at least some evidence that Congress probed the commerce clause basis of the statute and made substantial findings. 426 F.2d at 1078-80 and nn. 3-5. This may all be contrasted with the findings in this case, if indeed they may be so characterized. All that is present in the “debates” is statements by the bill’s author based on nothing but conjecture and a series of inferences which, if accepted, would support federal legislation concerning almost any criminal matter. 114 Cong. Rec., *supra*.

An interpretation of the statute that would allow prosecution for receipt or possession of firearms without a showing in each case that such receipt or posses-

sion was in or affecting interstate commerce would be an unprecedented extension of federal power. "There is no Supreme Court case which suggests that Congress can ignore the requirement that some connection with interstate commerce must be established as a basis for conviction of a federal crime where the power of Congress to enact the statute is derived from the commerce clause." See discussion of *United States v. Denmark*, 346 U.S. 441 (1953) in *United States v. Perez*, *supra* at 1082-1083 (dissenting opinion).

Reliance on the "findings" in section 1201 will not suffice to avoid the constitutional difficulties. It should first be pointed out that the inclusion of the commerce finding, alone, in the body of section 1202 suggests that Congress as a whole regarded the commerce clause as the source of its authority in this matter. In any case, the three alternative "findings," like the "burden on commerce" finding, are nothing more than assertions that a constitutional basis for such legislation exists. It is simply not enough, however, to proclaim that receipt or possession of firearms impedes, for example, free speech; it might just as well be argued that burglary of a house of worship impedes religious freedom and that therefore, a federal offense can be fashioned. Surely we have a right to expect that were such a departure from basic principles of federalism in the area of criminal law intended, particularly on such novel and esoteric theories, more consideration would have been given to the statute before its enactment.

Thus, the only rational interpretation of the statute, and the only interpretation of the statute that can avoid otherwise serious constitutional doubts is that which requires that receipt and possession, as well as transportation, be shown, in each case, to have been

“in commerce or affecting commerce.”³ Since such a showing was not made by the government in this case, appellant’s conviction cannot stand.

Because of the result we have reached, there is no need to discuss appellant’s further contention that the definition of “felony” in § 1202(c)(2) denies him the equal protection of the laws.

Reversed.

³ Compare *Haynes v. United States*, 390 U.S. 85, 88, 98 (1968), where it is made apparent that the National Firearms Act was predicated upon an exercise of Congressional power in the field of taxation.

APPENDIX B

UNITED STATES OF AMERICA

v.

DENNETH BASS, DEFENDANT

No. 69 Cr. 881

UNITED STATES DISTRICT COURT, S.D. NEW YORK.
FEB. 19, 1970.

Robt. M. Morgenthau, U.S. Atty., for the Southern District of New York, Thomas J. Fitzpatrick, Asst. U.S. Atty., of counsel for the Government.

Lawrence Kessler, New York City, for defendant.

MEMORANDUM

FRANKEL, District Judge.

Defendant has been found guilty by a jury under two counts of an indictment charging that on two specified occasions, having been previously convicted of a state felony, he possessed a firearm, thus violating 18 U.S.C. App. § 1202(a)(1). That statute says in pertinent part:

"Any person who * * * has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both."

It was stipulated that defendant had been convicted in the Supreme Court of New York, Bronx County, on or about February 1, 1968, of attempted grand larceny in the second degree, a felony. Thereafter, it was provided, on July 29 and July 30, 1969, he had in his possession a firearm, a pistol and then a shotgun, respectively.

There was no allegation in the indictment and no attempt by the prosecution to show that the possession of the firearm on either occasion transpired "in commerce or affecting commerce * * *." The absence of this element, defendant now urges, vitiates the conviction. Contending that the statute was intended to reach possession of firearms by convicted felons only if such possession was shown in fact to be "in commerce or affecting commerce," he moves for an order in arrest of judgment or for a judgment of acquittal.

For reasons which follow, the court holds erroneous the statutory construction upon which the motion is predicated.

To begin with, there is some modest, if by no means decisive, force in the government's grammatical analysis of the statutory text. The words "in commerce or affecting commerce" follow "transports," not "possesses," and there are words of approval in the books for the canon that such qualifying phrases, especially where the commas are arrayed like those here in question, should be deemed to relate only to the last antecedent. See *F. T. C. v. Mandel Brothers*, 359 U.S. 385, 389-390, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *T. I. McCormack Trucking Co. v. United States*, 298 F. Supp. 39, 41 (D.N.J.1969); 2 Sutherland, *Statutory Construction* § 4921 (3rd ed. 1943). As is often the case, however, see K. Llewellyn, *The Common Law Tradition* 522-28 (1960), there is a

contradictory canon in defendant's arsenal: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry. Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920); *United States v. Standard Brewery*, 251 U.S. 210, 218, 40 S.Ct. 139, 64 L.Ed. 229 (1920); *Buscaglia v. Bowie*, 139 F.2d 294, 296 (1st Cir. 1943); 2 *Sutherland*, loc. cit. *supra*.

Here, as elsewhere, then, the battle of canons and commas leaves us to seek for clues more promising to the legislative meaning.

The more substantial indicia in the statutory language and the pertinent, if somewhat sketchy, items of legislative history serve in total effect to refute defendant's argument. When the statute before us was enacted, the Congress and its constituencies were deeply disturbed by a recent history of horrible assassinations. At the same time the economic and human costs of individual and "organized" lawlessness were subjects of highly vocal concern. In that setting, the legislative findings are promptly intelligible and apposite here. The statute reported, *inter alia*, these centrally significant judgments of legislative fact:

"* * * that the receipt, possession, or transportation of a firearm by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce, [and]

(2) a threat to the safety of the President of the United States and Vice President of the United States (* * *)"

Both of the evils thus identified could be mitigated, and were intended to be mitigated, by forbidding possession of firearms to the specified classes of specially risky people, regardless of whether the possession itself occurred "in commerce or affecting commerce * * *." As was said by Senator Russell Long, sponsor of the amendment which became Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197:¹

"* * * Congress simply finds that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.

"You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you

¹ Sections 1201 and 1202 of Title 18 U.S.C. App. were enacted as Title VII of the Omnibus Crime Control and Safe Streets Act. The bill which (after thorough transformation) became that Act, H.R. 5037, 90th Cong., 1st Sess., started its legislative career as a measure designed to aid state and local governments in law enforcement by financial and administrative assistance. See H.R. Rep. No. 488 90th Cong., 1st Sess. (July 17, 1967). This bill passed the House August 8, 1967, and went to the Senate. A similar bill was introduced in the Senate (S. 917) and went to the Committee on the Judiciary, which rewrote it completely. See S. Rep. No. 1097, 90th Cong., 2d Sess. (April 29, 1968). The amendments included much debated provisions regarding the admissibility of confessions, wiretapping and state firearms control.

On May 17, 1968, Senator Long introduced on the floor his amendment to S. 917, which he designated Title VII. His introductory remarks set forth the purpose of the amendment. 114 Cong. Rec. 13,867-69. About a week later he explained once again the proposed effect of the addition. There was brief debate; the reaction appeared favorable but cautious. Unexpectedly, however, there was a call for a vote, and Title VII passed without amendment or extended discussion. See 114 Cong. Rec. 14,772-75 (1968).

like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce." 114 Cong. Rec. 13,869 (1968).

Similarly, the recent deaths by gunshot of a President, a presidential candidate and a national civil rights leader gave tragic testimony that disturbed people carrying weapons did not have to cross state lines to pose grave threats with which the national government had occasion (and power) to cope.² See, e.g., 114 Cong. Rec. 13,868-13,871, 14,772-14,775 (1968) (Sen. Long); 114 Cong. Rec. 16,297 (1968) (Cong. Pollock).

The same day the Senate agreed to strike out the language of H.R. 5037 and substitute the text of S. 917 as amended. Following this, the new H.R. 5037 was passed by the Senate. The House passed it then on June 6, 1968, 114 Cong. Rec. 16,271-300, and it was signed by the President on June 19, 1968.

² Senator Russell Long:

"* * * we clearly have a right to protect the life of the President of the United States. What happened with regard to the assassination of President Kennedy is a very good example. So we set forth that the possession of weapons by people of the type I have described—a description broad enough to include Mr. Oswald—would be a threat to the safety of the President of the United States and a threat to the Vice President of the United States. We employ many Secret Service agents to protect the lives of the President and the Vice President from people of that sort. We have passed a law making it a Federal crime for one to assassinate the President. If we have a right to pass that law, we certainly have a right to take measures to protect the lives of the President and the Vice President.

"Then we say that the possession and transportation of firearms by these people is an impediment or a threat to the exercise of free speech and to the exercise of religion guaranteed by the first amendment to the Constitution of the United States. That clause, of course, could clearly pertain to this Govern-

There is no need at this date in our history to document at length the power of Congress to reach intrastate occurrences which, in their voluminous and cumulative impact, may or do threaten the course of interstate commerce. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); *White v. United States*, 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928, 89 S.Ct. 260, 21 L.Ed.2d 266 (1968); *White v. United States*, 399 F.2d 813 (8th Cir. 1968). It is equally unnecessary to labor

ment's right to protect citizens, such as Martin Luther King, who are expressing either religious or political views and whose life might be endangered because someone did not agree with what they were saying." 114 Cong. Rec. 13,869 (1968).

"* * * this would make it apply to the gun Oswald had with which he killed John F. Kennedy.

"It would mean that Oswald * * * would not have had the right to carry that gun or practice with it or do anything else with it.

"Assuming that * * * this man Galt—a loser many times over, a felon, and an habitual criminal—was the man who killed Martin Luther King, this provision would have applied to him, too." 114 Cong. Rec. 14,773 (1968).

"While this, of course, could not have saved every person who has been assassinated—certainly, it would not have saved my father—at the same time, it would apply to many of the most fiendish assassinations that have occurred in our time." 114 Cong. Rec. 14,774 (1968).

Congressman Pollock:

"* * * we in this august body are faced with a somber and determined mood and temper of the Nation in the wake of riots and of the brutal, senseless slayings of Senator Robert F. Kennedy and Dr. Martin Luther King, a collective mood and temper which demand action * * *." 114 Cong. Rec. 16,297 (1968).

over the power to strike at dangers to the President or other federal officials whose security is a matter of "overwhelming" national concern. *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *In re Neagle*, 135 U.S. 1, 59, 10 S.Ct. 658, 34 L.Ed. 55 (1890). The defendant does not quite say, but tentatively hints, that there may be constitutional doubts about the statute as it has been defined to apply to his case. The court perceives no solid basis for such doubts.

It is concluded that the Congress could and did mean to reach cases like this one. Accordingly, defendant's motion is denied.

So ordered.

5

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and seventy.

Present: Hon. JOHN A. DANAHER, Hon. HENRY J. FREINDLY, Hon. PAUL R. HAYS, *Circuit Judges*.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DENNETH BASS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk*.

(29)

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1285

UNITED STATES OF AMERICA, PETITIONER

v.

DENNETH BASS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent argues in his brief in opposition (Br. 3) that there is "something less than a full-fledged conflict among the circuits" as to the statutory interpretation issue in this case because the cases cited in the government's petition from the Fourth and Ninth Circuits reaching a result contrary to the result below do not contain a plenary discussion of the question.¹ Subsequent to the filing of our petition for a writ of certiorari, the Eighth Circuit, in a comprehensive opinion reprinted as an appendix, *infra*, express-

¹ In one case, *United States v. Daniels*, 431 F. 2d 697 (C.A. 9), the court adopted the rationale of the district court in the instant case (see Pet. App. B), thus indicating its views with considerable specificity.